

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI

IN RE:)	
)	
JASON KENNETH CHRISTIANSEN,)	
)	
Debtor.)	
)	
JANETTE R. BRICKER (CHRISTIANSEN),)	Case No. 03-42027-7-drd
)	
Plaintiff,)	Adv. No. 03-04433
)	
v.)	
)	
JASON KENNETH CHRISTIANSEN,)	
)	
Defendant.)	
)	
)	

MEMORANDUM OPINION AND ORDER

This adversary proceeding comes before the Court on plaintiff Janette R. Bricker's ("Bricker") Complaint to Determine Dischargeability of Debt pursuant to 11 U.S.C. § 523(a)(15). A trial was held by this Court on November 18, 2003. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1). The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure as made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. For the reasons set forth below, I find that the debtor failed to satisfy his burden of proving that he lacks the ability to pay the debt or that the benefit to the debtor of discharging the debt outweighs the detriment to his ex-spouse, and that the debt is, therefore, not dischargeable pursuant to § 523(a)(15).

I. FACTUAL AND PROCEDURAL BACKGROUND

Bricker and Jason R. Christiansen (“Debtor”) were married in November 1994. No children were born of the marriage. On November 9, 2000, the Circuit Court of Platte County, Missouri entered its Judgment Decree of Dissolution of Marriage dissolving the marriage of Jason and Janette R. Christiansen (the “Judgment”). In the Judgment, the Circuit Court ordered that Debtor pay certain debts (the “Debt”) and to hold Bricker harmless in the event of his default.¹

Debtor filed a petition under Chapter 7 of the Bankruptcy Code on April 4, 2003. Debtor failed to list his ex-spouse as a co-debtor or a creditor on his original schedules and filed an amended Schedule F which listed Janette R. Christiansen as a creditor holding an unsecured nonpriority claim in the amount of \$35,958.70. On July 24, 2003, Bricker filed a Complaint to Determine Dischargeability of Debt pursuant to § 523(a)(15) (the “Complaint”). In the Complaint, Bricker alleged that the Debt is non-dischargeable because it was incurred by Debtor in the course of their divorce, and Debtor has the ability to pay the Debt from income or property of Debtor which is not reasonably necessary to be expended for the maintenance or support of Debtor and his dependent(s). Bricker also contends that the detrimental consequences to her should a discharge of the Debt be granted outweigh the benefit of such discharge to Debtor. Debtor argues that he is unable to pay the Debt and still support himself and his daughter and that the discharge of the Debt would result in a benefit to him that outweighs the detriment to Bricker.

Debtor is currently living with Shannon Bradford whom he describes as his “life partner,” her 13-year-old son and their 2-year-old daughter. Ms. Bradford is now pregnant with their second child.

¹Debtor was ordered to pay the following debts: USAA Federal Savings Bank Loan #00212223573; Chase Visa Account #4226610659523746; USAA Mastercard Account #5458830052018476; Military Star Card Account #0006019443000768554; First Card Visa Account #4366163079078586; Direct Merchants Bank Account #5458004023500497; and UNIPAC Student Loan Account #505902999-01, which totaled at the time \$36,267.51.

She and Debtor have lived together since December 2000 in the house owned by Ms. Bradford. Debtor has a bachelor's degree and has also completed several hours towards a masters degree in business at the University of Missouri-Kansas City. Debtor was an officer in the U.S. Marine Corps until October 2002. In August 2002, Debtor was employed as a sales manager at Lowe's but was terminated from that position. Debtor's recent tax returns show adjusted gross income of \$43,800.00 in 2000; \$46,123.00 in 2001; and \$58,189.00 in 2002.² Debtor testified that his 2002 income was higher than normal because his employment with the military overlapped with his employment at Lowe's. Debtor is currently employed by Covan World-Wide Moving, Inc. and has a net monthly take-home income of approximately \$3,162 per month. Ms. Bradford is employed at a law firm and has a net monthly take-home income of approximately \$1,450 per month.

Debtor's Schedule J indicates total monthly expenses in the amount of \$2,803.00.³ Debtor testified, however, that his monthly expenses have increased to \$3,209.00, consisting of the following: mortgage – \$650; utilities – \$125; water – \$35; telephone – \$65; cable – \$50; home maintenance – \$65; food – \$350; clothing – \$75; laundry/dry cleaning – \$10; medical/dental – \$45; transportation – \$200; recreation/clubs – \$100; charitable – \$10; life insurance – \$35; health insurance – \$375; auto insurance – \$80 (reduced because breathalyzer removed from vehicle); taxes – \$25; auto – \$200 (paid to parents); day care – \$541 (paid to Ms. Bradford's mother); and student loan – \$176.⁴ He anticipates they will increase again approximately \$200-\$250 per month once his next child is born.

²Plaintiff's Exhibits 1, 2 and 3.

³Mortgage – \$650; utilities – \$125; water – \$20; telephone – \$30; cable – \$50; food – \$250; clothing – \$25; medical/dental – \$20; transportation – \$150; recreation – \$50; life insurance – \$25; health insurance – \$160; auto insurance – \$125; auto – \$372; daycare – \$500; student loan – \$176; breathalyzer on vehicle – \$55; and probation – \$20.

⁴According to the Court's math, these figures add up to \$3,212.00.

Debtor testified that he is not liable on the mortgage on the residence he lives in with Ms. Bradford nor are the utilities in his name; the amounts listed above for those items are one-half of the monthly expenses incurred in those categories. When Debtor lost his job at Lowe's in June 2003, he transferred \$5100 from a Roth IRA into his savings account. He also received a \$4,000 loan from his parents to purchase a vehicle which he is re-paying at the rate of \$200 a month. Debtor testified that he pays Ms. Bradford's mother \$541 per month to provide daycare for their daughter. Ms. Bradford's 13-year-old son is apparently also often present during those times; however, Debtor testified that the amount he pays the daycare provider does not include any charges for watching the son.

II. DISCUSSION

A. Applicable Legal Principles

Section 523(a)(15) provides:

A discharge under section 727. . . does not discharge an individual debtor from any debt

not of a kind described in paragraph (5) [alimony, maintenance or support] that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record. . . unless-

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and , if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business, or (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Section 523(a)(15) is essentially an exception to an exception to discharge. The section creates a rebuttable presumption that debts incurred in the course of a divorce are nondischargeable, subject to two exceptions: the debtor's inability to pay the debt or that the

benefit to the debtor of discharging the debt outweighs any detriment to the ex-spouse.

O'Shaughnessy v. O'Shaughnessy (In re O'Shaughnessy), 301 B.R. 24, 29 (Bankr. N.D. Iowa 2003). *Lumley v. Lumley (In re Lumley)*, 258 B.R. 433, 436 (Bankr. W.D. Mo. 2001).

Initially, the creditor must establish that a debt is one that falls within the scope of paragraph (15)--i.e., the creditor must establish that the debt was incurred in the course of a divorce or separation. The burden of proof then shifts to the debtor to establish that the debt is dischargeable because the conditions set forth in either subparagraph (A) or subparagraph (B) exist. *See Fellner v. Fellner (In re Fellner)*, 256 B.R. 898, 902 (B.A.P. 8th Cir. 2001); *Moeder v. Moeder (In re Moeder)*, 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998); *Kirchner v. Kirchner (In re Kirchner)*, 206 B.R. 965, 970 (Bankr. W.D. Mo. 1997); *Florio v. Florio (In re Florio)*, 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995); *Lumley*, 258 B.R. at 436. Here, Bricker submitted a copy of the Judgment at the trial which Debtor did not dispute as a judgment that was entered in the course of the parties' divorce.⁵ Additionally, in paragraph 1 of Debtor's answer to the Complaint, he admitted that the Judgment ordered Debtor to pay the debts at issue. Therefore, I find that the creditor has established that the Debt was incurred in the course of a divorce, and the burden of proof thus shifts to Debtor to establish that the Debt is dischargeable under § 523(a)(15)(A) or (B).

The first defense available to a debtor is that the debt is dischargeable because he lacks the ability to pay the debt from income not reasonably necessary for the support of the debtor or a dependent of the debtor. *See* 11 U.S.C. § 523(a)(15)(A). The inquiry focuses primarily on a comparison of the debtor's income and expenses and whether the Debtor's expenses are

⁵Plaintiff's Ex. 8.

reasonably necessary. See *In re Jodoin*, 208 B.R. 132 (B.A.P. 9th Cir. 1997). An inability to pay exists if excepting the debt from discharge would “reduce a debtor’s income to below a level necessary for the support of the debtor and debtor’s dependents.” *Brown v. Brown (In re Brown)*, 2003 WL 22807368 at *4 (Bankr. N.D. Iowa 2003).

Debtor contends that the Court should assess his situation as of the date of filing of his amended schedules at which time he was unemployed. The law does not impose such blinders on the Court. The Court is not restricted to assessing the debtor’s income and expenses at the time of filing or even at the time of trial. A debtor’s present and future circumstances may be examined in determining disposable income for purposes of § 523(a)(15), and the court’s inquiry is not limited to the debtor’s financial strength at any single moment in time. See *Grunwald v. Beck (In re Beck)*, 298 B.R. 616, 623 (Bankr. W.D. Mo. 2003); *Fureigh v. Haney (In re Haney)*, 238 B.R. 432, 435 (Bankr. E.D. Ark. 1999) (“The appropriate analysis includes a view of the debtor’s future financial situation, including an ability to make minimal monthly payments on the debt, rather than a static view of the debtor’s current ability to pay the debt.”); *Johnson v. Rappleye (In re Rappleye)*, 210 B.R. 336, 340 (Bankr. W.D. Mo. 1997) (“Ability to pay under § 523(a)(15) does not necessarily mean at the time of trial, but requires the Court to consider debtor’s future earning capacity.” (citing *Florio*, 187 B.R. at 656-658)).

Because the language of § 523(a)(15)(A) is substantially the same as § 1325(b)(2)⁶, most courts use the same disposable income test for both sections. *Moeder*, 220 B.R. at 54-55. Thus,

⁶That section provides:

“[D]isposable income” means income which is received by the debtor and which is not reasonably necessary to be expended-

(A) for the maintenance or support of the debtor or a dependent of the debtor. . . and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2).

in assessing the debtor's ability to pay, the court should determine whether, after paying "reasonably necessary" expenses, the debtor has assets or income sufficient to pay the obligation in question by taking into consideration the debtor's entire economic circumstances. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1289 (8th Cir. 1997). In determining the extent of the debtor's disposable income, the Court may also consider any income earned by a spouse or live-in companion. *Brown*, 2003 WL 22807368 at *5; *In re Eiklenborg*, 286 B.R. 718, 722 (Bankr. N.D. Iowa 2002); *Shea v. Shea (In re Shea)*, 221 B.R. 491, 499-500 (Bankr. D. Minn. 1998) ("When supplemental income from a new spouse or live-in companion serves to alter the debtor's financial prospects, the Court must factor that consideration into its evaluation of [the debtor's] ability to pay" . . . "Absent consideration of a new spouse's income and its debt-absorbing impact upon the family's finances, . . . the Court cannot determine exactly what quantum of the debtor's own income truly is "necessary" for the support of himself and his dependents.")

B. Debtor's Ability to Pay

Here, I find that Debtor has not established his inability to pay the Debt. The Debtor failed to give this Court a complete picture of his income and expenses from which to determine whether he has disposable income which could be used to pay the Debt to his ex-spouse. Initially, the Debtor attempted to frame the income and expense picture solely in terms of his own income and his "share" of the household expenses. The fact that Ms. Bradford has an income which could be used to defray household expenses did not even come into evidence until the Debtor was cross-examined. Moreover, the Debtor also testified on cross-examination that he and Ms. Bradford had recently pooled their income into one account out of which all expenses are being drawn without regard to who benefits from the expense item. While the Court has testimony as to Ms. Bradford's net take-home pay, there is no evidence with regard to her gross monthly pay. As a result, the

Court has no information as to what is being deducted from Ms. Bradford's gross pay to arrive at a net income and whether such deductions constitute reasonable and necessary expenditures. For example, Ms. Bradford may be withholding excess amounts from her gross pay which might result in a large income tax refund. Ms. Bradford might be contributing large sums to a 401k or other retirement plan. Without information as to her gross monthly income, the Court cannot assess the nature, extent, necessity and reasonableness of any such deductions. If either of these things were being done, it would reduce the disposable income available to meet household expenses and impose upon Debtor's income the burden of the expenses of supporting Ms. Bradford and her 13-year-old son, neither of whom is a dependent of the Debtor. As it is, the Debtor apparently pays more than his "share" of the household expenses. He and Ms. Bradford are equally responsible for their two-year-old daughter, although the Debtor has no obligation to support either Ms. Bradford or her 13-year-old son. Accordingly, although Ms. Bradford and her dependents are likely responsible for more than half of the combined household expenses, Debtor nonetheless pays half of many of those category of expenses. To the extent any of Debtor's income goes to the support of Ms. Bradford and her son, it is obviously not for a reasonable and necessary expense for the support of Debtor or one of his dependents.

The evidence with regard to the joint household expenses is equally incomplete. The combined monthly take home pay of Debtor and Ms. Bradford is \$4,612.00. Debtor has testified as to monthly expenses which total \$3,212.00. In addition, it is possible to discern from the evidence that Ms. Bradford pays \$650 on the mortgage; \$125 on the utilities; \$35 on the water bill; \$65 on the telephone bill; and \$50 for cable service. Beyond that, there is no testimony with regard to what other expenses are paid from the combined monthly household income. Adding together the above amounts yields a total combined monthly expenditure of \$4,137.00. Based upon

this evidence, there would be net income of \$475 per month. While Ms. Bradford may well have other expenses, there is no evidence as to their nature and amount. In the absence of evidence of the combined income and expenses of the household, the Debtor has failed to meet his burden of proving that he is unable to pay the Debt to his ex-spouse. *See Eiklenborg*, 286 B.R. at 723 (“Debtor testified that she and her husband shared the expenses equally. Schedules I & J, however, do not include debtor’s husband’s income and expenses. As debtor has failed to present evidence necessary to establish a complete picture of her financial condition, the Court concludes that she has failed to meet her burden of proof regarding her inability to pay.”)

There are other gaps in the Debtor’s explanation as to his assets. Debtor has a Roth IRA account which is listed as having a value of \$6,066.62 as of the date of the filing of his schedules.⁷ Debtor testified on cross-examination that he withdrew \$5,100.00 from the IRA in June and transferred \$4,000 of that amount to his savings account. That money has not been accounted for and is another resource that might be used to reduce the Debt to his ex-spouse.

Further, Debtor has not demonstrated that all of his monthly expenses are “reasonable and necessary.” The evidence shows that Debtor has chosen to make \$200 monthly payments to his parents to repay a loan for the purchase of his vehicle. Debtor testified that his parents have no lien on the vehicle. Accordingly, if he suspended payments, they would have no right to take it from him. It is commendable that Debtor borrowed money from his parents in order to purchase a vehicle less expensive than the one he had been leasing and that he is attempting to repay this loan. It seems plausible, however, that Debtor’s parents would grant him a forbearance in repaying the loan so that he could pay the Debt on which he is legally obligated to his ex-spouse. Even if not,

⁷Defendant’s Ex. A.

his pre-existing obligation to Ms. Bricker should take precedence over his desire to repay his parents.

Similarly, it seems excessive to this Court that Debtor is paying Ms. Bradford's mother \$541 per month for child care. Debtor presented no evidence that this was a reasonable and necessary amount to pay for monthly child care, that less expensive child care was not available or that she would not or could not provide that care at a discounted cost or no cost given the relationship she has to the child and her mother.

The Debtor further testified that the household spends \$130 on telephone expenses and \$100 a month on cable. These expenses are excessive under the circumstances and could easily be cut in half. Debtor could also afford to re-direct the approximately \$10 per month he contributes to his college wrestling team. The \$350 per month the Debtor testifies he spends on food for himself and his two-year-old daughter also appears to be an excessive amount, especially given the frequency with which this family apparently eats outside the home, according to Debtor's testimony on cross-examination. Using the Debtor's bank statements for the months of July and August, 2003, Bricker's counsel identified numerous entries for food and entertainment expenses including \$196.65 for meals and \$89.85 for purchases to support Ms. Bradford's 13-year-old son's skateboarding hobby.⁸ Assuming these months are representative of the household's activity, they average \$143.25, which sum could be shaved from the monthly expenses. I find that these

⁸These figures are taken from the Debtor's testimony on cross-examination regarding withdrawals from the bank account for these months. Debtor confirmed the following withdrawals for dining expenses during the months of July and August: July 7 – \$41.36; July 7 – \$71.78; July 8 – \$18.60; August 4 – \$15.20; August 6 – \$28.40 and August 19 – \$21.31. These figures do not include withdrawals identified by Debtor on cross-examination as luncheon expenses for Ms. Bradford. Withdrawals relating to Ms. Bradford's son's skateboarding activities identified from the testimony occurred on July 9 in the amount of \$57.83 and August 22 in the amount of \$32.02. The meal expenses total \$196.65 and the hobby expenses are \$89.85 for an overall total of \$286.50. Averaging that figure for the two month period involved yields \$143.25. These figures demonstrate at least that the Debtor's household likely routinely spends more than the estimate of \$100 per month for recreation.

expenses are excessive and therefore not reasonable and necessary. *See, e.g., Fellner*, 256 at 903-04 (finding debtor has burden to show expenses were necessary and reasonable and holding truck expense unreasonable). *Vermaas v. Student Loans of North Dakota (In re Vermaas)*, 2003 WL 22889252 at *6 (Bankr. D. Neb. 2003) (monthly expense of \$140 for cable, internet and telephone excessive); *Schmidt v. SLM Corp. (In re Schmidt)*, 294 B.R. 741, 750 (Bankr. W.D. Mo. 2003) (telephone expense in excess of \$40 per month found excessive); *Standfuss v. U.S. Dept. of Educ. (In re Standfuss)*, 245 B.R. 356, 360 (Bankr. E.D. Mo. 2000) (entertainment expense of \$100 for family of five found excessive).

While the Debtor is certainly free to repay the money he borrowed from his parents, to provide employment for Ms. Bradford's mother and support for others with whom he has entered into new relationships, he may not also expect that this Court will, on that basis, free him from his pre-existing legal obligations to his ex-spouse. The Debtor has simply chosen to use his financial resources for the payment of obligations and expenses other than those he incurred in the dissolution of his marriage. This Court believes his obligation to his former spouse should take priority over those choices.⁹ *See Ferguson v. Enciso (In re Enciso)*, 300 B.R. 235, 243 (Bankr. W.D. Pa. 2003) ("Debtor's legally binding obligation to her former spouse should take priority over her munificence to her live-in boyfriend.")

It is not this Court's duty to construct a budget to demonstrate that the Debtor has the wherewithal to pay the Debt to his ex-spouse and still support himself and his dependents; rather it is Debtor's burden to demonstrate that he lacks the ability to pay. Nonetheless, as an illustration,

⁹The Court feels the same way about the \$200-\$250 in additional monthly expenses Debtor estimates he may face as a result of his decision to have another child with Ms. Bradford.

the Debt of approximately \$30,000¹⁰ could be repaid over a period of six years at the rate of \$5,000 per year or \$416.67 per month. That sum could be raised by suspending the Debtor's repayment to his parents, reducing or eliminating the payment to Ms. Bradford's mother for child care, scaling back the monthly entertainment expenses and reducing the telephone and cable costs.

The Court also notes that there is no evidence that Debtor or his daughter have any health problems which limit the Debtor's ability to work or impose unusual medical expenses. Debtor is well-educated and has a reasonably stable employment history. His recent income tax returns indicate a continual increase in his annual income. His health condition, education and expenses all suggest that he has significant earning potential which will produce equal or greater future yearly salaries.

C. Balance of Hardship

The second defense available to a debtor is that the benefits to the debtor of discharging the debt outweigh the detrimental consequences to the creditor. *See* 11 U.S.C. § 523(a)(15)(B). An assessment of the benefits and detriments under § 523(a)(15)(B) requires an analysis of the totality of circumstances, not just a comparison of the parties' net worth. *Florio*, 187 B.R. at 658. The test necessitates comparing the lifestyles of both parties and making a determination to measure the benefit of discharge to the degree of harm. *Schaefer v. Deppe (In re Deppe)*, 217 B.R. 253, 261 (Bankr. D. Minn. 1998).

In this case, Debtor did not present any evidence at the trial of Bricker's financial situation

¹⁰The evidence is that the Debt was \$29,797.44 as of April, 2003. Defendant's Ex. E. Although this amount may not include accrued and accruing interest and the total amount of the indebtedness may now be larger, it is also possible that Debtor's actual ultimate liability to Bricker may be less for the reason that his obligation to her under the Judgment is to indemnify her and hold her harmless for any amount she is required to pay. If for some reason Ms. Bricker is not actually required to pay the full amount of these debts, because they are compromised, or for some other reason, Debtor's liability will actually be less than the total face amount of these obligations.

or lifestyle. There is no evidence of her income, expenses, assets, liabilities, education, health or marital status. The only testimony Debtor submitted in support of his assertion that the benefit to the Debtor of discharging the Debt outweighs the detrimental consequences to Bricker was that Bricker could file a bankruptcy petition herself and discharge the Debt that she would be responsible for if the Debtor received a discharge of the Debt. This clearly is not sufficient to meet Debtor's burden of proof under § 523(a)(15)(B) as it does not permit the Court to weigh Bricker's current and likely future financial situation and lifestyle against those of the Debtor. At most, a bankruptcy filing would place her in the same or similar situation as the Debtor. Observing that she may have the same relief available to her does not demonstrate that the balance of hardship tips in favor of the Debtor. Debtor offered no evidence as to what impact such a filing might have on Bricker's financial situation and life circumstances. The Court finds, therefore, that Debtor failed to establish entitlement to discharge under § 523(a)(15)(B).

IV. CONCLUSION AND ORDER

Therefore, for the reasons stated above, it is

ORDERED that defendant Jason Kenneth Christiansen's Debt to his former spouse, Janette R. Bricker, is excepted from discharge under 11 U.S.C. § 523(a)(15) because the Debt was incurred in a decree of dissolution of marriage and Debtor did not meet his burden of proving that he is unable to pay the Debt from his disposable income under § 523(a)(15)(A), or that the relative benefits to Debtor of discharge of the Debt outweigh the detriment to Bricker under § 523(a)(15)(B).

SO ORDERED this ____ day of January 2004.

/s/ Dennis R. Dow
Bankruptcy Judge

